SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 290.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., APPELLANTS,

versus

UNITED STATES OF AMERICA, ET AL., APPELLEES.

NASHVILLE SWITCHING CASE.

BRIEF FOR APPELLANTS.

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Louisville, Ky., September, 1916.

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versus

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BRIEF FOR APPELLANTS.

I.

STATEMENT.

This case relates to the switching practices of the three railroads that serve the city of Nashville, Tenn.—the Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Tennessee Central Railroad Company. Only a single question is involved and that is one of law. It is whether a certain joint terminal arrangement between the first two of these railroads constitutes an unlawful discrimination against the third, when the latter has had no part in the construction, maintenance or operation of these joint terminals, and hence is not admitted to their use. In other words, is this joint ownership and operation of terminals by the

Except where otherwise specified, all italics are ours

two roads a "switching for each other" which requires them to switch for the third if they would be free from the penalty of an unjust discrimination?

They voluntarily switch non-competitive cars between industries on their tracks and the point of interchange with the Tennessee Central; but they refuse to switch *competitive* cars—those whose road-haul service they themselves can perform at the same rate—because to do so is to turn over to their competitor for a nominal switching charge the valuable road-haul revenue accruing from the shipments moving to or from industries upon their own terminals.

Complaint was filed with the Interstate Commerce Commission by the city of Nashville and its Traffic Bureau to compel the first two roads to switch competitive cars between industries on their lines and the point of interchange with the Tennessee Central. The Commission held that the arrangement between the Louisville & Nashville and the Nashville, Chattanooga & St. Louis was in fact merely a "switching for each other" and hence their refusal to switch for the Tennessee Central was a discrimination which it ordered the two roads to cease, that is, by dissolving their joint terminals or by admitting the Tennessee Central to the equal commercial use of them. (28 I. C. C. 533.)

By "commercial" use is meant the beneficial enjoyment, through having the two roads handle or switch the T. C.'s cars, in contradistinction to an "actual" use which would result if the T. C. had access to their terminals with its yard engines.

This suit was brought by appellants in the District Court for the Middle District of Tennessee to enjoin the enforcement of the Commission's order; and from the decision of the lower court sustaining that order (227 Fed. 258) this appeal is taken.

The record is quite large, because, in order to avoid the presumptions incident to an incomplete record, it was necessary to file as an exhibit with the bill the entire transcript of evidence heard by the Commission. Little of this, however, is important here because out of the numerous questions involved only this one of discrimination was made the basis of the Commission's decision.

Examination of this transcript will be practically unnecessary, as the historical and physical facts upon which the case must be decided either appear in the opinions of the Commission and the court or will be stated in this brief, and not denied by opposing counsel.

There is involved, therefore, the single question as to the effect of these undisputed facts. As an aid to the court's convenient consideration of it, we shall endeavor, at the risk of appearing prolix, to take from the record and present in this argument all the facts essential to a complete understanding and correct decision of the controversy—with the invitation, of course, to counsel for appellee to supplement or criticise if we fall short of doing this.

II.

SPECIFICATION OF ERRORS.

Only one error, in effect, is relied upon, and that is the finding of the court that the joint arrangement constitutes a switching of competitive cars by each of plaintiffs for the other, and hence that their refusal to switch competitive cars for the Tennessee Central constitutes an unjust discrimination. This error is set out more formally in the following assignment of errors (Vol. 1, p. 84):

> "1. The court erred in denying the application of plaintiffs for an interlocutory injunction herein and in dismissing their bill.
>
> "2. *Switching* by one railroad company for another, as meant in cases of this sort, is the movement, *by the company upon whose tracks an industry is located,* of a car between that industry and the point of interchange with another railroad, as the beginning of an outbound, or the ending of an inbound, transportation haul *over the other railroad.*
>
> "Here the uncontroverted facts and circumstances existing at Nashville in connection with the acquisition, maintenance, and operation of joint terminals by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway show indisputably, as a matter of law, that *plaintiffs do not switch traffic for each other,* either competitive or non-competitive, but that each in effect does its own switching, under a valid, joint owning and operating arrangement whereby they *acquired jointly*

their central and principal terminals at a cost of several million dollars, and to these each *contributed its privately owned tracks within the switching limits,* and all these terminals are operated *jointly,* the expense being shared substantially in proportion to the number of cars handled for each, so that each thus pays for the movement of its own cars, neither pays the other any switching charge, and none is paid by the shipper.

"The court, therefore, erred in holding that the arrangement between the plaintiffs for the joint ownership, maintenance and operation of the terminals at Nashville is in substance or effect *equivalent to one of said companies switching for the other,* or is essentially *the same as a reciprocal arrangement,* constituting a *facility* for the interchange of traffic between the lines of the two railroads within the meaning of the second paragraph of Section 3 of the Interstate Commerce Act; in holding that they must afford such facility to the Tennessee Central Railroad Company; and in holding that their refusal so to do and to switch competitive traffic to and from the Tennessee Central on the same terms as non-competitive traffic, when both kinds of traffic to and from their respective roads are handled alike under their joint arrangement, is unjustly discriminatory.

"3. Based upon the above conclusions, the Interstate Commerce Commission entered an order commanding plaintiffs to desist from maintaining a practice whereby they refuse to interchange interstate competitive traffic to and from the tracks of the Tennessee Central at Nashville on the same terms as interstate non-competitive traffic, while interchanging

both kinds of said traffic with each other on the same terms, and commanding plaintiffs to establish, publish, maintain and to apply to the switching of interstate traffic to and from the Tennessee Central tracks rates and charges which shall not be different from those which they contemporaneously maintain with respect to similar shipments from their respective tracks in said city.

"The court erred in holding that this order was supported by substantial evidence and that, upon the uncontroverted evidence, it involves no error of law; and in not holding that the report and order of the Commission were contrary to the indisputable nature of the evidence."

III.

BRIEF OF ARGUMENT.

It is not claimed by either the Commission or the court that the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, or either of them, could legally be required to switch competitive cars for the Tennessee Central as an original proposition. In fact, the Commission has in the very recent case of Louisville Board of Trade v. L. & N. R. R. Co., 40 I. C. C. 679, definitely rejected such a doctrine. The only ground upon which competitive switching for the Tennessee Central is here ordered is the finding that what the other two roads do is in effect to switch for each other and hence discriminate against the Tennessee Central in refusing to switch for it. We insist, on the contrary, that the undisputed facts, so far

from sustaining such a theory, distinctly show that the two roads named do not switch for each other and do not pay each other a switching charge, but that by reason of their joint operation of lawfully owned joint terminals each has access to all industries situated on those terminal tracks, and each actually handles its own car all the way to or from the industry and itself pays for such handling, just as it pays for all other terminal expenses incident to the handling of its own trains—passenger and freight—the switching to and from industrial plants being only a comparatively small part of all of the terminal services rendered at Nashville by the joint agency. But if, because of the joint agency, the transaction were not just the same as each switching its own car, it would still be so different from the service that is here ordered to be done for the T. C. as to afford no justification for the claim that the refusal to render said service is a discrimination.

1. Statement of Facts.

Instead of giving our own summary of the facts, we quote and adopt the statement given in the opinion of the lower court, which is practically the same as that to be found in the Commission's opinion. It is as follows (Vol. 1, p. 61):

> "The material facts established by the undisputed evidence before the Commission and set forth, in the main, in its detailed findings, may be thus summarized:

"Nashville is traversed and served by three railroads: The Louisville & Nashville, extending through from the north to the south; the Nashville & Chattanooga, from the west to the southeast; and the Tennessee Central, from the northwest to the east. The Louisville & Nashville and the Nashville & Chattanooga entered this city many years ago; the Tennessee Central in recent years. The Louisville & Nashville and the Nashville & Chattanooga are natural competitors for Nashville traffic; and each competes for such traffic with the Tennessee Central. All three railroads have extensive terminals in the city, with depots, yards, and tracks; their respective tracks reaching industries located mainly in different sections of the city, but partly in the same sections. The tracks of the Tennessee Central are connected with those of the Nashville & Chattanooga by an interchange track at Shops Junction, in the western section of the city, and with those of the Louisville & Nashville by an interchange track at Vine Hill, just outside the city on the south. The tracks of the Louisville & Nashville and the Nashville & Chattanooga are connected at several points, but *principally in the joint terminals operated by them in the center of the city,* as hereinafter set forth. The entire situation is fully shown by a map accompanying the report of the Commission. (38 I. C. C. Sup. Opp., p. 78.)

"Originally the northern and southern lines of the Louisville & Nashville had *separate terminals in different sections of the city,* and the Nashville & Chattanooga, a terminal midway between them; there being no track connections in the city between any of these different terminals. In *1872,* by agreement

between the companies, *the Louisville & Nashville acquired, for the annual rental of $18,000 and other valuable considerations,* perpetual trackage rights *connecting its two terminals with each other and with the terminal of the Nashville & Chattanooga;* this agreement also contemplating the construction of *a union passenger station on the depot grounds of the Nashville & Chattanooga.*

"In 1880 the Louisville & Nashville began to acquire the capital stock of the Nashville & Chattanooga, and now owns slightly more than 71 per cent thereof.

"In *1893,* to facilitate the construction of the proposed *union station and other terminal facilities,* the Louisville & Nashville and the Nashville & Chattanooga caused their co-petitioner, the Terminal Company, to be organized under the general incorporation laws of Tennessee. These laws give terminal companies *the right to lease their property and terminal facilities to any railroad company utilizing them,* upon such terms and time as may be agreed upon by the parties. The Louisville & Nashville owns all of the capital stock of the Terminal Company.

"On April 27, 1896, the Louisville & Nashville and the Nashville & Chattanooga, by separate indentures, leased to the Terminal Company for 999 years all of the property and railroad appurtenances thereon which they severally owned or controlled within or in the immediate vicinity of the original depot grounds of the Nashville & Chattanooga. In each of these leases the amount of the stipulated rental was left blank; the Terminal Company, however, cov-

enanting to keep the premises in repair and to pay all accruing taxes.

"On June 15, 1896, the Terminal Company leased to the Louisville & Nashville and the Nashville & Chattanooga, jointly, for 999 years, all the premises acquired by it under the former leases from them, together with all other premises which it had subsequently acquired or might thereafter acquire. Under this lease *the Terminal Company covenanted to construct upon the leased premises all passenger and freight buildings, tracks and other terminal facilities suitable and necessary for such railroads entering at Nashville as might contract with it therefor, and to pay all taxes and insurance upon the leased premises and the improvements to be constructed thereon;* while the two railroad companies *agreed to pay it annually as rental for the leased premises and the improvements thereon, 4% upon the actual cost of the acquisition of the premises and the construction of the improvements, in addition to the amount of the taxes and insurance;* and further *agreed to keep the leased properties in repair.*

"On June 21, 1898, the Terminal Company entered into a contract with the City of Nashville whereby it agreed to construct *a union passenger station on the premises covered by the above-mentioned leases, with freight depots, tracks, switches, etc., and viaducts over its tracks and certain new streets and extensions of streets;* the city agreeing to secure the condemnation of land, close certain streets, and erect approaches to certain of the viaducts. The *Louisville & Nashville and the Nashville & Chattanooga,* in consideration of the benefits to be received by them from the proposed improvements, *guaranteed the perform-*

ance of the obligations of the Terminal Company under the contract. This contract made no provisions for future railroads.

"The improvements agreed upon, including *the passenger station, depot, tracks, etc., were duly made,* being completed in *1900.* The tracks thus constructed by the Terminal Company are connected with those of the Louisville & Nashville and the Nashville & Chattanooga, *but not with those of the Tennessee Central.*

"The contribution of the city to these improvements cost approximately $100,000; while the total cost of the Terminal Company was considerably *in excess of two million dollars.* To enable the Terminal Company to acquire the additional properties which it had purchased in addition to those leased to it by the two railroads, and to construct these improvements, the Louisville & Nashville and the Nashville & Chattanooga from time to time advanced to it the necessary funds. To repay these advances the Terminal Company executed a mortgage securing an authorized issue of three million dollars of bonds. These bonds were guaranteed by the two railroads, under authority given by the Tennessee laws relating to terminal companies. Of these authorized bonds, *$2,535,000 were actually issued,* the proceeds of which were used to repay the advances made by the railroads.

"During the construction of these terminal facilities the Louisville & Nashville and the Nashville & Chattanooga continued, as theretofore, to operate their respective terminals independently, under reciprocal switching arrangements, by which each switched cars for the other to and from their

local destinations, at a uniform charge of $2.00 per car; this switching charge being absorbed on competitive traffic by the railroad having the transportation haul, while on non-competitive traffic it was paid by the shipper or consignee.

"*On August 15, 1900, shortly after the completion of the terminal facilities by the Terminal Company,* the Louisville & Nashville and the Nashville & Chattanooga, *being then the only two railroads entering Nashville,* as a matter, primarily at least, of *economy in the operation of terminal facilities,* entered into an agreement under which *they have since maintained and operated joint terminal facilities at Nashville,* the effect of which is the underlying matter of controversy in this case. The essential provisions of this agreement are as follows:

"The two railroads created an unincorporated organization, styled in the agreement the 'Nashville Terminals,' and hereinafter called the Terminals, for the maintenance and operation of terminals at Nashville, embracing in such organization *all the properties, buildings, tracks, and terminal facilities leased to them by the Terminal Company, together with certain other individually owned tracks which they severally contributed and attached to said terminals,* consisting of 8.10 miles of main and 23.80 miles of side track contributed by the Louisville & Nashville, and 12.15 miles of main and 26.37 miles of side tracks contributed by the Nashville & Chattanooga. The agreement further provided: (a) That the entire properties thus included within the Terminals should be maintained and operated, as such, under the management of a Board of Control, consisting of a Superintendent of the Terminals and

the General Managers of the two railroads, the operation of the Terminals to be under the immediate control of the Superintendent, who should appoint, subject to the approval of the Board, a Station Master, Master of Trains, and other designated officers, each of whom should have a staff of employes for the conduct of his department; (b) that the expenses of maintaining and operating the Terminals should be apportioned between the two railroads as follows: passenger service expenses (including all expenses of the union passenger station) in proportion to the number of passenger train cars and locomotives handled by the Terminals for each; siding expenses (to be ascertained on the basis of the number of hours that yard engines were engaged in switching to and from house and private sidings, and bulk or team tracks, as compared with the total number of hours that they were engaged in all classes of service) in proportion to 'the total number of cars placed on and withdrawn from house and private sidings, bulk or team tracks (by the Terminals) for each' railroad; train yard expenses, in proportion to the number of all cars and train locomotives received and forwarded by the Terminals for each; and general expenses, in proportion to the average percentages of the three other expense accounts; provided, that before such apportionment of expenses, there should be deducted from the aggregate expenses all moneys received by the Terminals for room rents, restaurant and news-stands privileges, etc., and services rendered any other person; (c) that the separate freight stations and appurtenant tracks of each railroad and the tracks allotted to each for receiving and delivering bulk freights,

should be maintained and operated by the Terminals for each of them direct, and the expenses thereof charged directly to each; a like provision being made in reference to the operation of the terminal roundhouse for the Louisville & Nashville alone; (d) that each railroad should set apart and allot to the use of the Terminals, switching engines adequate to the work of switching and pulling trains in and about the Terminals, corresponding in efficiency to the proportion of work performed for each; which should be maintained and kept in repair by the Terminals and for which it should pay the railroads four per cent annually upon their valuation at the time of allotment; and (e) that the rights, privileges and uses of all the property in the Terminals by the respective railroads, should be 'the same, equal and joint, and none other,' except only as to the bulk tracks, etc., operated for each separately.

"In operating under this agreement *all the work of breaking up incoming freight trains of both railroads* after they come into the central yards of the Terminals, and of *collecting and making up outgoing freight trains for both railroads before they leave such yards,* is performed by the Terminals. Thus, when an incoming freight train comes in *on the line of either railroad* into the central yards, all cars destined for industries located within the Terminals, either on the tracks jointly leased to the Terminal Company or on the tracks of either railroad otherwise included within the Terminals, are switched by the Terminals to such local destination, without distinction as to the particular tracks on which such industries are located; and, conversely, freight cars loaded at industries located on any of such tracks for

transportation out of Nashville on the line of either railroad, are switched by the Terminals to the central yards and made up into the outgoing train. In other words, the entire switching service in reference to either the incoming or the outgoing freight trains of each railroad to and from the separate and joint tracks of both railroads, is performed by the Terminals, acting as joint agent of the two railroads under the Terminal agreement. However, in accordance with this agreement, *the only direct charge for such switching service is, in effect, made against the railroad having the transportation haul, in accordance with the provision that the siding expenses shall be apportioned between the two railroads* in proportion to 'the total number of cars placed on and withdrawn from house and private sidings, bulk and train tracks, for each of the parties.' Obviously, however, this apportionment of siding expenses does not represent the entire actual cost incident to the switching services, as it does not include any part of the general expenses and fixed charges of the Terminal, which are apportioned between the two railroads upon a different basis, as provided by the agreement.

"The interchange track between the Nashville & Chattanooga and the Tennessee Central at Shops Junction is within the switching limits of the Terminals under this agreement, but the interchange track between the Lousville & Nashville and the Tennessee Central at Vine Hill is outside of these switching limits.

"On December 3, 1902, the Terminal Company, the Louisville & Nashville, and the Nashville & Chattanooga entered into an agreement, reciting that the

two leases of April 27, 1896, from the railroads to the Terminal Company had been cancelled and abrogated; modifying the lease of June 25, 1896, from the Terminal Company to the railroads, so that thereafter it should only include certain tracks and parcels of land that had been directly acquired by the Terminal Company, and should be otherwise rescinded and abrogated and the properties of the railroads otherwise respectfully restored as they were prior to the lease, subject only to the mortgage that had been executed thereon by the Terminal Company to secure its issue of bonds; reducing the term of the lease to 99 years; and modifying in certain respects the provisions of the lease as to the rental to be paid.

"The Terminal tariffs of both railroads publish service by the Terminals and provide that '*there is no switching charge to or from locations on tracks of the Nashville Terminals, within the switching limits, on freight traffic, carloads, from or destined to Nashville*' *over either railroad*, 'regardless of whether such traffic is from or destined to competitive or non-competitive points.'

"The Tennessee Central entered Nashville in 1901-2, after strong opposition from the Louisville & Nashville, and leased its terminal facilities, consisting of a passenger station, freight depots, tracks, etc., from another Tennessee railroad terminal corporation that had been organized in 1893.

"Prior to 1907 neither the Louisville & Nashville or the Nashville & Chattanooga would interchange traffic with the Tennessee Central at Nashville or any other point of connection. In that year, however, they both began to interchange with the Ten-

nessee Central at Nashville all non-competitive traffic, exclusive of coal traffic, at the rate of $3.00 per car; non-competitive Nashville traffic being defined as traffic between Nashville and points reached only by one railroad into Nashville or points served by two or more railroads into Nashville for which, however, one railroad can maintain rates which the others can not meet. This interchange of non-competitive traffic between both the Louisville & Nashville and the Nashville & Chattanooga was and is effected by the connection between the Tennessee Central and the Nashville & Chattanooga at Shops Junction, there being no direct connection between the Tennessee Central and the Louisville & Nashville.

"On December 9, 1913, upon complaint by the City of Nashville, and others, the Commission found that the Louisville & Nashville and the Nashville & Chattanooga switched all traffic for each other at Nashville but refused to switch coal to and from the Tennessee Central except at a prohibitive rate, thereby unjustly discriminating against coal to and from the Tennessee Central in favor of coal to and from each other's lines, and entered an order requiring the Louisville & Nashville and the Nashville & Chattanooga to abstain from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the Tennessee Central at Nashville from that maintained with respect to similar shipments from and to their respective tracks. The Louisville & Nashville and the Nashville & Chattanooga thereupon filed a petition in this court seeking to restrain the execution of this order and applied for an interlocutory injunction, which

was denied by this court. Louisville Railroad v. United States (D. C.), 216 Fed. 672 (three judges). This decision was recently affirmed, on appeal, by the Supreme Court. Louisville Railroad v. United States, 238 U. S. 1. This order, however, was interpreted by both railroads, as relating exclusively to non-competitive coal, and while they have since that time switched non-competitive coal to and from the Tennessee Central at $3.00 per car, the same as other non-competitive traffic, they have not changed their former practice relative to competitive coal.

"A table introduced in evidence by the petitioners (33 I. C. C., at p. 83), shows the average cost to the Terminals of handling city freight traffic to be, exclusive of fixed charges, $4.128 per car. The Commission was of opinion, that, while these figures might not be absolutely correct, they were not shown to be substantially incorrect, and that the charge of $3.00 per car for switching Tennessee Central non-competitive traffic was not shown to be unreasonably high; a conclusion in which we entirely concur.

"The Louisville & Nashville will switch competitive coal and other competitive traffic at Nashville to and from the Tennessee Central but only at its local rates, such interchange being usually effected through the agency of the Terminals, at Shops Junction, over the rails of the Nashville & Chattanooga. For a while the Nashville & Chattanooga would in like manner perform the same switching service to and from the Tennessee Central at its local rates, its published Terminal tariff of December 14, 1913, expressly providing that such local rates would apply on competitive traffic from and destined to the Tennessee Central. Since January 25, 1914, how-

ever, shortly after the complaint in this case was filed, its Terminal tariff has provided that competitive traffic will not be switched to and from the Tennessee Central, and no local rate applicable thereto has been published. The Terminal tariff of the Tennessee Central provides that Louisville & Nashville and Nashville & Chattanooga competitive traffic will be switched at its local rates. The local rates applied to such switching by the Louisville & Nashville total from $12 to $36 per car; by the Nashville & Chattanooga from $7 to $36 per car; and by the Tennessee Central from $5 to $36 per car. These rates are virtually prohibitive. The Tennessee Central favors their reduction; but will not reduce its rates until the other railroads do likewise.

"The cost to the Terminals of switching competitive Tennessee Central traffic is the same as the cost of switching non-competitive. The Louisville & Nashville interswitched competitive and non-competitive traffic on the same terms with other carriers at Memphis, Tenn., Birmingham, Ala., and several other points. The Nashville & Chattanooga interswitches both kinds of traffic with all other carriers at all connection points at the same rates, except with the Tennessee Central at Nashville; having had in effect at Lebanon, Tenn., where it also connects with the Tennessee Central, a switching charge of $2 per car for both kinds of traffic since November 14, 1914.

"The physical conditions surrounding the interchange of traffic between the lines of the Louisville & Nashville and the Nashville & Chattanooga, on the one hand, and the Tennessee Central, on the other, in reference to the number and location of industries,

the switching movements, involved, and the like, are set forth in detail in the report of the Commission (33 I. C. C., at p. 86). Without restating them here, it is sufficient to say that we entirely concur in the finding of the Commission that the physical conditions of interchange of traffic between the lines of the Louisville & Nashville and the Nashville & Chattanooga and the Tennessee Central are not shown to differ substantially from the conditions of interchange between the lines of the Louisville & Nashville and the Nashville & Chattanooga, and that, moreover, none of the conditions relating to the switching Tennessee Central traffic appear to differ materially from the conditions of interchange between the lines of the Louisville & Nashville and the Nashville & Chattanooga prior to the establishment of the Terminals."

To show the conclusions of the court and the reasoning upon which they are founded, we further quote that part of the opinion which immediately follows the above recital of facts. The court said:

> Upon the foregoing facts, we have, after careful consideration, reached the following conclusions:
>
> The operation jointly carried on by the Louisville & Nashville and the Nashville & Chattanooga under the Terminals agreement is not a mere exchange of trackage rights to and from industries on their respective lines at Nashville, under which each does all of its own switching at Nashville and neither switches for the other. It is, on the contrary, in substance and effect, an arrangement under which the entire switching service for each railroad over the joint and separately owned tracks is performed jointly by

both, operating as principals through the Terminals as their joint agent; each railroad, as one of such joint principals, hence performing through such agency switching service for both itself and the other railroad. And the fact that the charge for such joint switching service is made on an approximately proportionate basis of actual cost, exclusive of fixed charges, against the railroad having the transportation haul, does not, in our opinion, change the underlying and dominant fact, that the switching service itself is performed by both railroads jointly, that is by each railroad operating as a joint principal through the means of the joint agency; the apportionment of the expenses relating only to the payment for the service and not to the joint performance of the service itself. And, viewed in its fundamental aspect, and considered with reference to its ultimate effect, we entirely concur in the conclusion of the Commission that such joint switching operation "is essentially the same as *a reciprocal switching arrangement,*" constituting a *facility for the interchange of traffic* between the lines of the two railroads, *within the meaning of the second paragraph of Section 3 of the Interstate Commerce Act.* That each railroad does not separately switch for the other, but that such switching operations are carried on jointly, *is not, in our opinion, material. If it were, all reciprocal switching operations carried on by two railroads at any connecting point of several carriers, could be easily put beyond the reach of the Act, and its remedial purpose defeated, by the simple device of employing a joint agency to do such reciprocal switching.* The controlling test of the statute, however, lies in the nature of the work done,

rather than in the particular device employed or the names applied to those engaged in it. See, by analogy, United States v. Chicago Railroad, 237 U. S. 410, 413.

Being, in effect, *a reciprocal switching operation* carried on by the Louisville & Nashville and the Nashville & Chattanooga, *constituting a facility for the interchange* of traffic between these two railroads, it necessarily follows, under Section 3 of the Interstate Commerce Act, *that equal facilities must be afforded all other lines for like interchange of traffic, without discrimination;* and, that, under Section 15 of the Act, the Commission is authorized to require the railroads performing such reciprocal service to desist from any discriminatory service in respect to such switching operations. Pennsylvania Co. v. United States, 236 U. S. 351; Louisville Railroad v. United States (U. S.), *sup.* at p. 20; Louisville Railroad v. United States (D. C.), *sup.*, at p. 683.

And in view of the fact that the physical conditions surrounding the interchange of traffic between the lines of the Louisville & Nashville and the Nashville & Chattanooga, on the one hand, and the Tennessee Central, on the other, are not substantially different from those surrounding the interchange of traffic between the lines of the Louisville & Nashville and the Nashville & Chattanooga, and that the cost to the Louisville & Nashville and the Nashville & Chattanooga of switching competitive Tennessee Central traffic is the same as that of switching its non-competitive traffic, we entirely concur in the conclusion of the Commission that the refusal of the Louisville & Nashville and the Nashville & Chattanooga to switch competitive traffic to and from the

Tennessee Central on the same terms as non-competitive traffic, while interchanging both kinds of traffic on the same terms with each other, is unjustly discriminatory. Such discrimination is not, in our opinion, obviated by the fact that the joint switching operation of the Louisville & Nashville and the Nashville & Chattanooga involves the use of the joint Terminals which they have constructed at great expense, or the fact that under the Terminals agreement they contribute to the expense of maintaining the Terminals and carrying on their switching operations in the manner hereinbefore set forth.

* * * * * * * * * * *

We therefore conclude that the application of the Louisville & Nashville and the Nashville & Chattanooga for a temporary injunction should be denied. And since there is exhibited with and as a part of the petition all the evidence taken before the Commission, we are constrained to conclude that the petition shows on its face no equity or ground for permanently enjoining the enforcement of the order of the Commission, which is the ultimate relief sought. We are hence of the opinion that the motion of the United States and of the Commission to *dismiss the petition* should, as to the petitioning railroads, be sustained.

2. Certain Incidental Questions.

Before discussing the ultimate conclusion that we insist should be drawn from the foregoing facts, it is deemed proper briefly to consider here certain incidental matters, a clear understanding of which is somewhat material to the decision of the main question.

(1) What is Switching?

Switching by one railroad for another, as that expression is used in this case and in all other switching cases which have been considered by the courts, means, as we have defined it in the second assignment of errors, the movement *by the company upon whose tracks an industry is located* of a car between that industry and the point of interchange with another railroad, as the beginning of an outbound, or the ending of an inbound, *transportation haul over the other railroad.*

In other words, it is the initial or final movement of a car upon the terminal tracks of one railroad in aid of the road-haul movement over another railroad. The railroad upon whose terminals is located the industry which is the origin or destination of the car, moves the car with its switch engine to or from the point of interchange with the other road, and thus is said to *switch for it.*

As compensation for this service it receives a small fee per car called a "switching charge," while the railroad which performs the road-haul service gets the road-haul revenue.

(2) Switching Competitive Traffic.

This is what the Commission orders the appellants to do for the Tennessee Central (Vol. II, p. 589), and it is this that they are here resisting, whether or not they should switch this traffic being the sole question in the case.

a. *Its Meaning.*

Competitive traffic is carload freight moving to or from an industry situated upon the terminal tracks of a railroad company (which may be called the Owning Company) when the ultimate origin or destination of the car can be reached by the rails of that company (either alone or with its connections) and at a rate no greater than that of its competitor to whose line it is asked to switch the car.

The Owning Company naturally is unwilling to switch traffic (except where its competitor can reciprocate), because to do so means to give over to its competitor, in return for a nominal switching charge, the valuable road-haul revenues to which it is entitled because of the industry being located upon its terminals.

b. *Consequences to the Shipper.*

Refusal to do such switching does no material harm to the shipper for the Owning Company (upon whose terminal tracks his industry is located) performs the road-haul service at the same rates as its competitor. The shipper may be subjected to slight inconvenience incident to drayage where the car comes in over some other line, but this results only because of a misrouting which occurs only once in thousands of cars, and when it does the other railroad pays this drayage.

As shown in the foregoing statement of facts the Tennessee Central also refuses to switch competitive traffic

for the plaintiffs, but, as explained by the court (Vol. I, p. 69), this is merely retaliatory. Naturally it desires reciprocal switching because thereby more industries would be opened to it that it would open to plaintiffs; accordingly it made no defense to this proceeding to obtain switching for competitive traffic, but it has not in its own name asked it.

To avoid the inconvenience incident to the occasional misrouting of a car, all three companies have ordinarily hauled the car at "nearest station" rates, which are too high to justify the other railroad absorbing. The Commission in speaking of this, thus supports our contention that the shipper is not pecuniarily affected (Vol. II, pp. 586-587):

> "The virtually prohibitive charges imposed by defendants for switching competitive Tennessee Central traffic at Nashville *causes Nashville shippers little direct pecuniary loss.* Industries located on any of the three lines can avoid the switching charges imposed by the others *by shipping over the line on which they are located.*"

c. *Consequences to the Companies Owning the Terminals.*

The ground of the objection to switching competitive traffic for a competitor is that the carrier owning the terminals has acquired them at great cost solely as an aid and incident to the performance of this transportation service, and, if their use is thus turned over to a competitor, the owning company is not only deprived of the

road-haul revenue to obtain which it acquired these terminals, but it sees a competitor, by the use of its property, enriched to the exact extent of its own money loss, while the public, represented by the shipper, saves nothing, because the same freight charges apply over either line. Nor would the insignificant switching charge deter a competitor from actively soliciting the business of these industries, for it is glad enough to charge the shipper only the transportation rate, thus itself absorbing the slight switching charge, in order to get the large road-haul revenue. In this way the competitor, besides sharing the business of the company owning the terminals, would as a quasi-partner, enjoy its terminals upon more favorable terms than the owner itself, as it would get all the benefits of ownership without participating in the original cost or in the continuing expenditures for maintenance, taxes, interest, repairs and other fixed charges.

The money loss above referred to will be very great. The uncontradicted proof offered by the men best qualified to know—the heads of their respective traffic departments—shows that requiring the plaintiffs to switch competitive traffic for the Tennessee Central at Nashville will cause them a net loss in road-haul revenues (after deducting cost of service and the returns from competitive traffic they will get from the Tennessee Central) amounting to the enormous sum of $190,630.00 per annum—$106,480.00 to be lost to the L. & N. (Vol. I, pp. 39-49) and $84,150.00 to be lost to the N., C. & St. L. (Vol. I, pp. 50-56).

d. *The Law as to Requiring Competitive Switching.*

The question as to whether or not the Commission has the power to require a railroad to switch competitive traffic, where there is no claim of discrimination, was much debated in the trial of this case before the Commission, but it did not expressly decide the question. It apparently considered, however, that it had no such power, because its order was based solely upon the ground of discrimination. This it can always compel the carrier to discontinue, as it does not involve a definite order to do any particular thing, but leaves it to the option of the carrier to cease doing the thing under consideration or else to do it for others. Since the decision in this case, however, the Commission has rendered its opinion in the Louisville Switching Case (Board of Trade v. Louisville & Nashville R. R. Co., 40 I. C. C. 679, decided July 5, 1916), in which it distinctly held that the Act to Regulate Commerce forbids the Commission to require competitive switching.

There, in construing this act it uses the following language, which could hardly be plainer:

> "The proviso in Section 3 protects the carrier that has secured and built up valuable terminals, without which its railroad would be of little use, against having those terminals utilized by a competing carrier that has not provided itself with adequate terminals and that desires to thus secure the line haul which the carrier owning the terminals is prepared to perform and which the other carrier can

not secure unless it can have the use of the terminals of its competitor."

And again, in showing the injustice of giving one road's terminals to another that has none, the Commission said:

> "We can not believe that the law was intended to mean that a competing rail line may now be built between important commercial centers served by a railroad long established and possessing adequate and valuable terminals at both points, and 'by making a physical connection' 'at an arbitrary point near its terminus' be accorded the right of access to those terminals for originating and delivering freight hauled by it and which the carrier owning the terminals is not only prepared but anxious to carry at rates and under rules and regulations that are subject to all of the requirements and restrictions of the Act."

In that case, while distinctly holding that it had no power to compel competitive switching, the Commission found, as in this case, that the L. & N. in switching for the C. & O. was discriminating against other roads entering Louisville, and accordingly ordered that discrimination to be discontinued. This was promptly done by ceasing to switch for the C. & O., so that the L. & N. now lawfully refuses to switch competitive traffic for any of the railroads serving Louisville.

(3) The Language of the Commission's Order.

The meaning of the rather peculiar language of the Commission's order is not quite clear without a word of explanation. It must be remembered that the plaintiffs since 1907 (Vol. I, p. 67) have regularly switched non-competitive traffic to and from the Tennessee Central tracks at the nominal switching charge of $3.00 per car. They did this because they were interested in having the shippers on their tracks extend their buying and selling markets to points on the lines of other railroads which plaintiffs' lines would not reach. What the Commission purposed by its order was to require plaintiffs to switch competitive cars for the Tennessee Central so long as they switched them for each other, that is, so long as they continued their existing joint terminal arrangement; but this could not be ordered positively, as this court has decided in *Great Northern* v. *Minnesota*, 238 U. S. 340, 346, that the carrier always has the right to exercise its option in determining which of two courses it will pursue to avoid the discrimination. To accomplish its purpose, then, the Commission used the roundabout expression contained both in the opinion and order—to cease refusing "to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville *on the same terms as interstate non-competitive traffic*, while *interchanging both kinds of said traffic on the same terms with each other*, as said practice is found by the Commission in its said report to be unjustly discriminatory" (Vol. II, p. 589). They are not ordered to

switch competitive traffic for the Tennessee Central because they already switch non-competitive, but they are ordered to switch both for the Tennessee Central because they treat both alike and switch both for each other.

The next step, which was still more remarkable, necessarily called for the second section of the order requiring plaintiffs to publish and thereafter to maintain and apply to the switching of interstate traffic (both competitive and non-competitive) to and from the tracks of the Tennessee Central Railroad Company at said Nashville, "*rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city*" (Vol. II, p. 590). And this is ordered notwithstanding the facts that each of the plaintiff companies handles all cars *clear through to or from the industry on its tracks;* that it *pays to its associate no switching charge;* and that it follows the universal custom of railroads *to make no charge against the shipper* for the terminal service incident to a delivery on its own tracks.

It may be noted, in passing, that aside from all other considerations, the logical result of the conditions described in the last two subsections is that the plaintiffs can in no event be required to switch for the Tennessee Central.

In the first (d) we have seen that the Commission can not require one railroad to switch competitive traffic for another. Upon what principle, then, can two companies, which own their terminals jointly and operate them as

one, be required to switch competitive traffic for an outsider?

In the second subsection (3) it is shown that the Commission requires plaintiffs in switching for the Tennessee Central to charge "rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city." This is a practical impossibility, as the plaintiffs make no charge either against each other or against a shipper for switching movements to and from industries upon their tracks. The logical result, then, of this order is that plaintiffs must begin, against their will, assessing switching charges against the shippers upon their tracks in order, forsooth, that they may assess such a charge against the Tennessee Central; or else that they must switch for the Tennessee Central without charge. Either of these propositions seems unbelievable.

(4) The Terminal Company's Status.

The Louisville & Nashville Terminal Company, which is the name of the corporation that holds the legal title to the Union Station property and central yards (subject to the mortgage thereon) was made a party to this proceeding, but having leased its property for 99 years to the plaintiffs, it has no active participation in the business. It must not be confused with the "Nashville Terminals" which is the designation of the joint agency, by means of which the plaintiffs operate the terminals and, among

other things, keep proper account of the services chargeable to each.

(5) Reciprocal Switching at Memphis and Other Cities.

There is some mention in the opinion of "reciprocal switching," in which one or both of plaintiffs participate at certain other cities in the South; but this was merely treated as evidence of such a custom presumably not being unfair or burdensome. It is readily seen, however, that this depends upon the conditions at each place. It is usual in many cities for railroads to practice switching competitive cars for each other for a nominal switching charge, but ordinarily this occurs only when the industries upon their respective tracks are so evenly balanced that the loss and gain of revenue hauls practically equalize each other. The Commission, however, did not base its order upon discrimination caused by a different practice at other places, but upon the claim that the plaintiffs switch both competitive and non-competitive traffic for each other at Nashville, and upon the same terms, and yet refuse to do so for the Tennessee Central.

3. Argument.

The statement of the case quoted above from the opinion of the lower court, considered along with the foregoing discussion of certain other incidental facts, speaks so plainly that an extended argument in support of the plaintiffs' contentions concerning the various points involved is hardly necessary. Plaintiffs summarize these as follows:

1. Each plaintiff pays for, and through the joint agency performs, the service incident to switching its car between the point of interchange and the industry, in the case of every car which is hauled inbound or outbound over its tracks. Accordingly neither switches for the other nor discriminates against the Tennessee Central in refusing to switch for it.

2. If the arrangement at Nashville should be held to constitute any sort of switching service, rendered by one of the constituent companies to the other, it would not constitute an unjust or undue discrimination for the reason that the circumstances and conditions under which the service is rendered are totally dissimilar from those necessarily existing in connection with the handling of cars for the Tennessee Central.

3. Jointly owned, maintained and operated terminals are not "facilities," the equal use of which must, under Section 3 of the Act to Regulate Commerce, be given to other roads not interested therein. If they are not, then Section 3 of the Act to Regulate Commerce does not apply and the Commission is without jurisdiction to forbid the alleged discrimination.

4. The joint arrangement at Nashville is not a mere "*device*" to enable the two constituent companies to accomplish reciprocal switching without having to do the same for the third Nashville Railroad.

5. This court can review and set aside the Commission's order when the ultimate conclusion from undisputed facts is wrong.

6. The decision of this court in a former litigation, involving a somewhat similar question, is not an authority here because the facts before the court in the two cases are wholly different.

7. This court has distinctly approved the right of two companies to unite their terminals for their exclusive use.

(1) Plaintiffs do not Switch for Each Other and hence do not Discriminate Against the Tennessee Central in Refusing to Switch for it.

The Commission finds that the exchange of facilities between the plaintiffs, together with their joint operating arrangement, constitutes what it conceives to be reciprocal switching. There is no difference between reciprocal switching and any other switching so far as the physical performance of the service is concerned. It always involves the above-described physical action upon the part of the company owning the terminals. Reciprocal switching is merely the custom that railroads have of doing this switching for each other, generally at a nominal charge. It is well understood that this charge does not afford compensation for the service actually rendered, as the real consideration is the expectation of getting a practically equivalent amount of like competitive business from industries upon the rails of the other road.

There are many outstanding differences between reciprocal switching and what is done between the plaintiffs at Nashville.

In reciprocal switching there is always a *fixed charge per car,* which is paid by the transportation line to the company owning the terminals. At Nashville the transportation line pays no charge to the company that happens to hold the legal title to the tracks upon which the industry is located. Besides some of the industries are located upon the jointly owned central terminals.

In reciprocal switching the line owning the terminal tracks performs the service of moving the car between the industry and the point of interchange at its own cost, charging, as above stated, a fixed fee as against the transportation line. In Nashville, the situation is reversed. The transportation line itself pays the cost of switching the car from the point of interchange to the industry upon the other company's track. This is done by dividing the joint expenses according to the number of cars handled for each line, the company having the transportation haul being considered as the owner of the car in question from the beginning to the end of every haul, including the terminal service.

In order to consider this question analytically, let us see how a condition similar to the present one at Nashville can be evolved by gradual, but entirely legal, steps. Leaving out of consideration, for the argument's sake, the important feature of their actual joint ownership of the union station and principal terminal yards, suppose, for example, that while the L. & N. and N., C. & St. L. are owning and operating their terminals independently, the L. & N. purchases from the N., C. & St. L. trackage rights over the latter's terminals, agreeing

to pay a fixed, annual money rental, as was done in the case of the first acquisition by it of trackage rights through the terminals. Suppose later the N., C. & St. L. R'y purchases for a money consideration trackage rights over the L. & N.'s tracks at Nashville. Under these two contracts, each road would be *running its own engines and trains,* not only over its own tracks, but over the tracks, the use of which it had leased from the other. If the doctrine, which we attempt to establish elsewhere in this brief, that a railroad company can not be compelled against its will to grant the physical use of its tracks to another railroad, is sound, then certainly the Tennessee Central would have no legal right to complain of the existence of these two contracts between the L. & N. and the N., C. & St. L., or to demand anything for itself because of them.

Suppose, however, these two companies should come to the conclusion (which was reached by the Interstate Commerce Commission in this case) that the value and extent of their respective terminals are practically equal, and should, therefore, agree to let them off-set each other so that each would be granting trackage rights to the other in consideration of like trackage rights granted to it; this would not change the status of the transaction and it would be just as legal as it was when each paid the other a money rental.

Up to this time we have assumed that they are operating these terminals separately, each doing its own switching throughout the entire terminals and using its own engines and crews for that purpose. If, in this state of

case, the parties should reach the natural conclusion that the operation of separate crews is expensive and inconvenient, necessarily causing more or less interference in the work of each, and should, therefore, decide to perform this work of switching through one joint agency, representing both companies, but upon terms that each should pay for its own work by paying such proportion of the total joint expense as represented its portion of the work done, certainly the legal status of the arrangement would be unaffected by this change in the method of operating. In the handling of a particular car for one of the roads the act of the joint agency in handling said car would be the act of the company owning and transporting the car, just as much as the act of a jointly employed ticket agent would be the act of the company whose ticket was being sold.

This being true, the relation of the parties would be the same as at the outset.

Where in this progressive process could a third railroad claim that it is wronged? At what point and why can it lawfully assert the *right* either to be admitted to the joint arrangement or to have the constituent companies do for it something else which will accomplish the purpose of giving it access to the joint terminals upon even more favorable terms than the owners?

But the case at Nashville is not that of two companies merely exchanging trackage rights over their individually owned tracks within a city. There the plaintiffs through a holding company formed by them, jointly acquired a parcel of valuable land (over a mile long) and also cer-

tain rights of way in the heart of the city of Nashville and jointly constructed thereon a union station and extensive yards at a cost of $2,535,000. Upon it are 1.07 miles of main track and 30.32 miles of side tracks, including the principal "breaking up" and "making up" yards.

Certainly the Tennessee Central could not object to their jointly using this jointly owned property—and industries are located on it just as upon their other tracks. But manifestly these interior terminals were useless if they could not be reached by the transportation lines of the two roads. Equally plain is it that great confusion and economic waste would have occurred if each road had attempted to operate its own switch engines into and over these central jointly owned terminals. It results, therefore, that the two roads were almost compelled to adopt the plan of also including in the joint property their individually owned tracks, which connected with and formed an inseparable part of the central terminals, and of operating the whole with joint engines and switching crews under one control.

This was accordingly done by the joint owning and agency contract of August 15, 1900 (Vol. II, p. 378), made immediately upon the completion of the union station and central yard improvements, and nearly two years before the Tennessee Central railroad was built.

From the history of the relations between the two companies and the other evidence in the case, all set forth in the court's statement, *supra*, certain facts in connec-

tion with this joint arrangement are established beyond question.

1. Under it each of the two constituent companies has a legal right to the *physical use* of all the terminals in Nashville (except certain freight houses) owned by the Louisville & Nashville individually, the Nashville and Chattanooga individually, and the two jointly under the long time lease from the Louisville & Nashville Terminal Company. The latter is the central yards, where the union station, with its appurtenances, and the points of interchange and main connecting tracks are located.

2. The joint agency (consisting of a superintendent under the joint control of the two General Managers, with all the necessary agents and employes working under the superintendent), operates these terminals as the representative of each company and of both companies, and the equipment, though contributed in equitable proportions by the two, becomes at once the equipment of the joint agency.

3. Accurate accounts are kept and at the end of each month a settlement is made whereby each pays its portion of all the joint expenses, including the $101,400.00 interest and other fixed charges in proportion to the number of cars handled for each and the other bases of calculation provided in the contract.

4. All the trains over each line, both freight and passenger, come into the central yards, where they are at once taken in charge by the joint agency which proceeds to break them up and then to make up new trains of cars going to the various parts of the terminals, where

they are again broken up into individual cars and taken to the industries. The same process reversed is followed in gathering up outbound cars which are first taken to the central yards and there made up into trains.

5. This joint terminal service covers five grand divisions of business: (1) All passenger trains entering or leaving the city of Nashville, which includes all services in connection with cleaning and otherwise handling the coaches and engines; (2) the vast number of through trains, passenger and freight, passing between the north and south through Nashville; (3) all freight cars destined to or coming from the depots and team tracks; (4) all cars moving to or from the various industries located upon the terminal tracks; and (5) the management of the union station and all the employes, freight and passenger, serving thereon.

Under this simple, economical and convenient plan it is evident that each road owns all the terminals for its purposes, regardless of whether the legal title is held by one or the other or by the Terminal Company. And, furthermore, by reason of each one paying for the handling of its own car entirely through the terminals, whether it be inbound or outbound, the service in connection with handling such car is really performed by the company which brings it in or carries it out. In other words, whether a car handled in the terminals is to be considered that of the Louisville & Nashville or of the Nashville & Chattanooga depends upon which line gets the transportation haul. If the car comes in over the L. & N. transportation line and is delivered to an in-

dustry in the terminals it is treated as an L. & N. car until the final delivery is made, and so with a car originating at any industry upon the joint terminals which has destined to go out over the Louisville & Nashville. The same is true with reference to the Nashville, Chattanooga & St. Louis. In this way each road actually handles the car with its own employes and equipment, over its own tracks, to or from its own industry and at its own cost. The other company pays nothing in connection with such movements. *Neither pays the other* any switching charge, and *the public does not have to pay any switching charge upon either competitive or non-competitive cars.*

(2) In No Event Could the Arrangement at Nashville Constitute a Discrimination Against the Tennessee Central Because of Wholly Dissimilar Circumstances and Conditions.

It is impossible for us to conceive of this joint arrangement operating in any sense as a discrimination against the Tennessee Central, but, if it could be so held, it would not affect the soundness of plaintiffs' position since there is no evidence whatever to show a similarity of circumstances, except the finding of the court and Commission that the physical act of switching for the Tennessee Central can be performed at substantially the same cost as upon their own track. Section 3 of the Act to Regulate Commerce only forbids the giving of an "undue or unreasonable preference or advantage" and requires only the giving of "equal facilities." In the case here presented all the evidence goes to show an utter dissimi-

larity of conditions and circumstances. It is unnecessary to repeat them here. It is enough, by way of recapitulation, to merely mention some of the cardinal ones, namely, that neither receives any service from nor renders any service to the other, but that each owns the right to and does operate its own trains over the terminals leased from the other, and this it does at its own expense; that they assess no switching charge, nor, indeed, any charge against each other and none is charged to the shipper; that they actually own by joint lease the central train yards (costing $100,000 a year) where the points of interchange with each other and their principal switching yards are located. *None of these facts exist in connection with a movement by or for the Tennessee Central.* In other words, the difference in circumstances and conditions applies to every feature, except the cost of physical movement, of both operation and ownership.

Furthermore, in pursuing this discrimination theory the Commission is led into declaring, and logically so, that the plaintiffs must switch for the Tennessee Central at confiscatory rates, that is for *cost,* without any return on the property used. This is declared in its opinion (Vol. II, p. 587) thus:

> "Under all of the circumstances disclosed we are of the opinion and find that defendants' refusal to switch competitive traffic to and from the Tennessee Central at Nashville on the same terms as non-competitive traffic while interchanging both kinds of traffic on the same terms with each other is unjustly dis-

criminatory, and that so long as defendants switch both competitive and non-competitive traffic for each other at Nashville at a charge *equal to the cost of the service, exclusive of fixed charges*, the charges imposed for switching Tennessee Central traffic *should not exceed the cost of the service performed.*"

This is confiscatory and illegal because the constituent companies would get nothing to equalize the interest or return on their property, and nothing for overhead expenses. The necessity for the charge being indefinite—the cost of service—is another demonstration of the impracticability, in addition to the illegality, of the Commission's theory of discrimination.

(3) The Joint Terminal Arrangement is Not a "Facility" as that Word is Used in Section 3 of the Act to Regulate Commerce.) If Not, then Section 3 Does Not Apply and the Commission is Without Power to Forbid the Alleged Discrimination here Charged.

Here is the crucial point in the Commission's report and order and in the lower court's decision.

The court in its opinion concedes, as it must (Vol. I, page 70) that the alleged discrimination, which the Commission makes the sole basis of its order, must arise, if at all, under the second paragraph of Section 3 of the Act to Regulate Commerce. This paragraph reads as follows:

"Every common carrier subject to the provisions of this Act shall, according to their respective pow-

ers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; *but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.*"

Recognizing, as stated, that the Commission's jurisdiction came solely from this statute, the Commission and the court met it squarely and in support of their finding that, as a matter of law, the facts here shown constitute a discrimination, the court, following the Commission, thus states its position:

"And, viewed in its fundamental aspect, and considered with reference to its ultimate effect, we entirely concur in the conclusion of the Commission that such joint switching operation 'is essentially the same as *a reciprocal switching arrangement,*' constituting a *facility for the interchange of traffic,* between the lines of the two railroads, *within the meaning of the second paragraph of Section 3 of the Interstate Commerce Act.*

* * * * * * * * *

"Being, in effect, *a reciprocal switching operation* carried on by the Louisville & Nashville and the Nashville & Chattanooga, *constituting a facility for the interchange* of traffic between these two railroads, it necessarily follows, *under Section 3* of the Interstate Commerce Act, *that equal facilities must be*

afforded all other lines for like interchange of traffic, without discrimination.''

With this unequivocal statement of the court before us the preliminary question may be illustrated thus:

If carrier A affords a certain facility to carrier B and refuses it to carrier C, can the Commission, in its effort to prevent what it considers discrimination, require A, *instead of affording the same facility,* to do for C something else, which is in fact wholly different but which the Commission supposes will put C in as good a position as to ultimate results as B.?

Certainly no reason or authority can be found for allowing the Commission to substitute something else for the *facility* which a carrier gives to one and refuses to give to another. We submit that the requirement of the statute that a carrier afford *equal facilities* clearly means that whatever it does for one it must do for another and the Commission's order must require it to remove the discrimination either by ceasing to give the facility in question to B or by giving it also to C.

This is not only the correct interpretation of the statute as it is written, but it is the fair and reasonable thing to do. Continuing the illustration, A should be permitted, at its option, to remove the discrimination by discontinuing B's use of the facility or by affording the same one to C; and yet according to the theory adopted in this case, A can be denied this latter option and be compelled to submit to a substitute of the Commission's own making, which may be much more expensive or inconvenient than affording to C the same facility as to B.

Applying this interpretation of the statute to our case it is manifest that if the joint arrangement of plaintiffs be a *facility*, the denial of which to the Tennessee Central constitutes a discrimination, then the way to remove the discrimination is to order plaintiffs to discontinue the arrangement or else *to admit the Tennessee Central to it* upon proper terms. But there are two things, either of which will prevent the Commission from validly making this latter requirement: (1) a dissimilarity of conditions and circumstances, in which case there is no unjust or undue discrimination; or (2) the prohibition of some law. While either of these two barriers is sufficient for us, it happens that both exist in this case. The dissimilarity in conditions we have fully discussed herein, particularly in the next preceding section, and we believe it clearly appears from the undisputed evidence that this dissimilarity is fully established, and hence that the Commission's finding of discrimination as a fact is unsupported by substantial evidence. The proviso at the end of Section 3 is the law that conclusively forbids the Commission to order plaintiffs to admit the Tennessee Central to the physical use of their terminal tracks. This effect of the proviso, as declared by the courts, we shall discuss a little later herein.

The Commission clearly saw that it was primarily limited to the alternative of ordering admission for the T. C. to plaintiffs' joint arrangement, but it took the position that if that could be ordered a substitute therefor would be equally valid. But it knew that it must first have the power to order *reciprocal trackage rights*, before

it could order, in lieu thereof, *reciprocal switching;* and it accordingly claims that power. It wobbles somewhat in its opinion as to the legal status of this joint arrangement, but unequivocally asserts, as the fundamental proposition, that *reciprocal trackage rights over terminal tracks* come within the definition of *facility* as used in Section 3.

While its opinion in one place (Vol. 2, p. 580) declares that "the joint maintenance and operation of the tracks utilized in a sense *constitutes the terminal tracks of each road the tracks of the other,*" in another place the Commission, speaking of the contention of the plaintiffs (defendants in the Commission's proceeding) that the arrangement as to their individually owned tracks was an exchange of trackage rights, says (Vol. II, p. 581):

> "We can not agree with defendants' contention that they have merely exchanged trackage rights. But even if they have, we think the term 'facility,' as used in Section 3 of the act, also includes **reciprocal trackage rights over terminal tracks,** the consequences and advantages to shippers being identical with those accruing from reciprocal switching arrangements."

It may be repeated, in passing, that there is no evidence whatever to show that the consequences and advantages to shippers from *reciprocal trackage rights* are "identical with those accruing from reciprocal switching arrangements." It is enough to recall that one notable difference, as shown by the uncontradicted evidence, is that under *reciprocal trackage rights* the shipper pays

no switching charge whatever, the traffic being carried to or from his industry for the regular tariff rate; while under the *reciprocal switching plan* there is added to the regular rate a switching charge per car which is usually absorbed by the transportation line in the case of competitive cars, but which is *universally paid by the shipper on non-competitive cars.*

Of course, it is understood that the arrangement of plaintiffs is not made up solely of exchange trackage rights. They have in the case of a large part, and by far the most important and valuable part, of these terminals actually *bought them jointly,* so that the individually owned tracks which they subsequently contribute to the joint arrangement, thus to that extent *exchanging trackage rights,* is only a comparatively minor incident, though a necessary one, to the main plan. But if the feature of joint ownership did not exist and there were nothing in this case except the mere exchange of trackage rights by two companies, the above declaration of the Commission, which is the ultimate foundation of its order, is utterly unsound in law. We say this because it is not only supported by no authority, but is definitely condemned by all authority.

The controlling authority is the proviso to Section 3, the statute under which this proceeding was brought. This proviso, following immediately the "equal facilities" paragraph and separated from it by a semicolon, reads as follows:

"but this shall not be construed as refuiring any such common carrier to give the *use of its tracks or terminal facilities to another carrier engaged in like business.*"

This proviso is an express limitation imposed upon the Commission's power in the matter of ordering equal facilities. It must always stop short of requiring one road to afford another road physical access to its "*tracks and terminal facilities.*" In other words, the right of a railroad to sell to another railroad (whether for money or other trackage rights or other thing) the *physical use* of its road, that is trackage rights, and that without incurring a similar obligation to other railroads is thereby ratified and preserved.

Considering it first in the light of the common knowledge of all it is manifest that if one railroad can not give, lease or sell to another railroad the right of physical access to its tracks, commonly known as trackage rights, without thereby authorizing all other railroads to demand, as a matter of right, the same privilege, or the same sort of contract, or even an equivalent substitute, as here ordered, then the custom in vogue throughout the United States of granting trackage rights, having great value and involving enormous sums of money, will have to be discontinued, as railroads will be unwilling to make contracts for trackage rights with such disastrous consequences just ahead.

And all authorities concur in our view of the above proviso to Section 3.

In *K. & I. Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. 567, in which the K. & I. Bridge Co. sought and obtained from the Commission an order requiring the L. & N. R. R. Co. to interchange freight at a certain point of physical connection between the two roads, Circuit Judge Jackson, in declaring said order void because, among other reasons, it was a violation of the tracks and terminals proviso to Section 3 of the act, expressly held that private contracts (such, for example, as the one between the N., C. & St. L. and the L. & N. now under discussion) were not prohibited by the act, saying of the proviso:

> "Now, under this last limitation upon, or qualification of, the duty of affording all reasonable, proper and *equal facilities* for the interchange or for the receiving, forwarding and delivering of traffic to and from and between connecting lines, *it is clearly left open to any common carrier to contract or enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines,* **or of discriminating against other carriers who are not parties to, or included in, such arrangements.** *No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines.*"

This matter of interchanging freight between railroads is now put in the hands of the Commission by an amendment authorizing it to require carriers to make

through routes and joint rates, but through routes and joint rates are not involved here and the court's discussion of the proviso, which has never been amended, is as pertinent today as when it was written by Judge Jackson.

This doctrine was adhered to literally in the opinion by Circuit Justice Field in *Oregon Short Line & U. N. R'y Co.* v. *Northern Pacific R'y Co.*, 51 Fed. 465 (affirmed by the C. C. A. in 61 Fed.), where he said after citing the above-mentioned case:

> "It follows from this, as it was decided in that case, that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, *or of unlawfully discriminating against other carriers.* In making arrangements for such use by other companies, a common carrier will be governed by consideration of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, *except in the specific particulars indicated.*"

And so in *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R'y Co.*, 59 Fed. 400, where the court, in discussing this same Section 3, said that, "no common carrier can justly complain of another, *because it is not allowed the use of the tracks and terminal facilities of such other railway company in the same manner and to the same extent another is*"; and further "that the fact that one connecting railway company *has a contract for* the interchange

of interstate commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, *would not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company.*"

These are some of the authorities which show conclusively the fallacy of the Commission's major premise that it can order reciprocal trackage arangements.

It necessarily follows, therefore, that if the joint trackage and terminal arrangement of plaintiffs is beyond the power of the Commission under the "equal facilities" statute, it is lawful for all purposes and can not be used as the pretext for ordering a substitute in the nature of a reciprocal switching arrangement or any other method of indirectly giving the Tennessee Central the benefit of plaintiffs' terminals.

It is worth noting that this proviso to Section 3 of the Act to Regulate Commerce, construed in the foregoing cases, has never been amended. We are aware that it is a mooted question whether the proviso serves to prevent the Commission ordering switching, independent of the question of discrimination, but no such question is here presented. This is a discrimination case, that being the sole ground of the Commission's order. Besides, the Commission decided in the Louisville switching case, *supra*, that it had no power to order switching, except in the case of discrimination; and in that case the discriminatory act was *switching*, not *granting trackage rights*.

(4) The Joint Arrangement of Plaintiffs is Not a "Device" to Evade the Act to Regulate Commerce.

After declaring its conclusion that plaintiffs' "joint switching operation is essentially the same as a reciprocal switching arrangement constituting a facility," the court proceeded (Vol. I, p. 70):

> "That each railroad does not separately switch for the other, but that such switching operations are carried on jointly, *is not, in our opinion, material. If it were, all reciprocal switching operations carried on by two railroads at any connecting point of several carriers, could be easily put beyond the reach of the Act, and its remedial purpose defeated, by the simple device of employing a joint agency to do such reciprocal switching.*"

This is a concession that they do not in fact "switch for each other," as that term is ordinarily understood and as the order requires them to do for the Tennessee Central. This being true the reference to the "device" is intended to apply directly to our arrangement, for according to the necessary meaning of the court's language it holds that unless the terminal arrangement of plaintiffs is a "device," then Section 3 does not apply and there is no discrimination. We have seen that Section 3 can not apply in any event, but we will nevertheless consider this additional theory of the lower court.

We respectfully insist that a study of this record disclases no substantial evidence whatever in support of the proposition that this arrangmeent is a device

to evade the Act to Regulate Commerce. This word, according to the dictionary, carries the idea of at least impropriety. It is defined as an "artifice," a "strategem." Not a line of proof of such a claim appears in the statement of facts by either the Commission or the court, and we submit that counsel for defendants will find none elsewhere in the record. On the contrary, every fact shows that only considerations of convenience and economy, growing out of the close relationship of the two companies and their joint adventure in the acquisition and construction of terminals, brought about the arrangement.

We will not weary the court with a recapitulation of the facts that irrefutably establish this proposition, but ask indulgence for here mentioning some of the outstanding ones. The entire record bristles with them, and not a one appears on the other side.

In the first place theirs is not "a joint agency *to do such reciprocal switching.*" Reciprocal switching, it will be remembered, is a term that relates only to the switching of cars to and from industries. But here the joint agency takes charge of *all* trains, passenger and freight, through and local, as soon as they come into the station, and performs all terminal services in connection with them; so also with the making up and preparatory handling of all outgoing trains of every character. The same is true of all local switching between industries in Nashville.

Then, too, this arrangement is not confined, in its physical aspects and extent, to the industrial tracks. It takes in the union station itself and all terminal property of every sort (except certain individual freight houses, which manifestly are necessary for their separate freight), and it embraces the operation of the union station, with its joint ticket office and all other like terminal facilities. Furthermore, it involves not merely the exchange of trackage rights over individually owned tracks, but the *joint ownership,* by lease, of the union station and central yards, property which cost them $2,535,000.

The inconvenience, waste and danger incident to the separate operation of this jointly owned property (for the station facilities, points of interchange and principal yards are located on it) and the practical necessity of operating them with joint engines and crews and putting into the arrangement their privately owned tracks over which alone there was access to the jointly owned central property—we have already fully commented on.

Another feature of recognized importance is the kinship of the two companies. In the case of *Waverly Oil Works Co.* v. *Pa. R. R. Co.,* 28 I. C. C. 621, which involved the switching practice at Pittsburg and in which complaint was made of the treatment by the different Pennsylvania lines of the other railroads serving that city, the Commission said of this phase of the case:

> "Looking at the present situation as a question of fact, we are not impressed that these Pennsylvania lines unduly discriminate against other lines by de-

clining to accord the same treatment to outside railroads which they accord to one another. While the lines *are independently operated,* their ownership is identical. These lines have been welded into one system. It seems to us a natural thing, and one of great benefit to the public, that these family lines should treat the industries of Pittsburg as though all these lines which are in fact connected by a common ownership were under a common operation in name as well as in fact. We hold that there is no unjust discrimination arising out of the circumstance that the different members of the Pennsylvania system accord the use of their terminals to one another while refusing it on the same terms to their outside competitors."

This fact of the relationship of the two plaintiffs, one of which owns 71% of the stock of the other, is relevant as a circumstance bearing upon both the propriety and the economic purpose of their joint acquisition and operation of the terminals as well as upon the absence of proof of a device.

But perhaps more convincing than any is the fact that this joint arrangement, which was a gradual evolution beginning in 1872, was fully consummated in 1900, nearly two years before the Tennessee Central was built into Nashville. A brief recital of these steps, which are given quite fully in the court's opinion (Vol. I, pages 62, *et seq*), may be helpful. In 1872 the Louisville & Nashville acquired from the Nashville & Chattanooga perpetual joint trackage rights over some of the most important terminal tracks involved in the present controversy, paying there-

for $18,000 per year and other valuable considerations. And this very agreement, even though made eight years before it owned any stock in the N., C. & St. L., provided for the construction of a union depot on the Nashville & Chattanooga's depot grounds.

In 1893 the Terminal Company was formed as the initial step toward the construction of the Union depot. This company acquired much valuable property in the center of the city. Upon it are more than 30 miles of tracks to-day. In April, 1896, the two constituent companies leased to the Terminal Company for 999 years all their individually owned property lying in the vicinity of the central property. In June, 1896, the Terminal Company leased to the two companies jointly for 999 years, all its property. Treating these long time leases as practically carrying the fee this lease put in the two companies jointly the title to all the Terminal Company's property, including the above-mentioned contiguous property which had originally been owned by the two companies separately, but which they had leased to the Terminal Company in the previous April. [It may be explained here that the modification in 1902 of this lease of June, 1896, whereby the legal title of this contiguous separately owned property (subject of course to the mortgage for about two and a half million dollars) was restored to its original owners, done manifestly for taxation purposes, did not affect the title of the property originally owned by the Terminal Company (which is still owned by the two companies jointly) and did not affect the present arrangement, as the tracks on those parcels

automatically went along with their other separately owned tracks into the joint operating arrangement of August, 1900.]

In 1898 the work of constructing the jointly owned central yards and terminal facilities began.

And in 1900, immediately upon their completion, the agreement was made that provided for an exchange of trackage rights over their individually owned tracks, and for the joint operation and maintenance of the terminals, all of which were then jointly owned or possessed.

During all the time these plans were working out the plaintiffs owned the only two railroads serving Nashville. Not until thirty years after the plans were begun and about two years after they were completed, did a third railroad, the Tennessee Central, come to Nashville.

We submit that these uncontroverted facts show conclusively that this arrangement was not a "device" to avoid the discrimination clause of Section 3 of the Act to Regulate Commerce.

(5) This Court Can Review the Commission's Order where its Ultimate Conclusion from Undisputed Facts is Wrong.

This proposition, we think, will hardly be denied in the light of the lower court's approval of it, but it was vigorously controverted in the court below.

Of course, as was indicated by this court in *United States* v. *L. & N. R. R. Co.*, 235 U. S. 314, and in *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, the courts will not substitute their judgment for that of the Commission in cases where

its conclusions are supported by evidence, but when the facts found do not support the conclusions, or if, as the Supreme Court said in the case of *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91, "*the facts found do not as a matter of law support the* orders made," the court will interfere.

The principle of all of the cases is that if the action of the Commission is arbitrary, or is supported by no evidence or no substantial evidence, or is even contrary to the indisputable character of the evidence, the action of the Commission is void. It will be sufficient to quote, merely by way of reminder, from the one case of Interstate Commerce Commission v. L. & N. R. Co., 227 U. S. 88, 91, 92. Here the court enumerates the different kinds of cases where the order is void, citing authorities. It says:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; *if the finding was contrary to the 'indisputable character of the evidence.'* Tangtun v. Edsell, 223 U. S. 673, 681; Chin Yoh v. United States, 208 U. S. 8, 13; Low Wah Suey v. Backus, 225 U. S. 460, 468; Zakonaite v. Wolf, 226 U. S. 272; *or, if the facts found do not, as a matter of law, support the order made.* United States v. B. & O. S. W. R. R., 226 U. S. 14, Cf. Atlantic C. L. v. North Carolina Corp. Com., 206 U. S. 1, 20; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301; Oregon Railroad v. Fairchild, 224

U. S. 510; I. C. C. v. Illinois Central, 215 U. S. 452, 470; Southern Pacific Co. v. Interstate Com. Com., 219 U. S. 433; Muser v. Magone, 155 U. S. 240, 247. * * *

"Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was *no evidence to show* that the rates were unreasonable, there was no jurisdiction to make the order Int. Com. Comm. v. Northern Pacific R'y, 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusions of fact (Int. Com. Comm. v. Delaware, etc., R'y, 220 U. S. 235, 251), *by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law.*"

The doctrine is thus well stated in the lower court's opinion in the case at bar, Vol. I, p. 61:

"It is well settled, on the one hand, that a conclusion of the Commission upon a question of fact, such as the reasonableness of a rate or the giving of a preference, whose correctness depends wholly upon a consideration of the weight to be given before it, will not be reviewed by the court; and, on the other hand, that a conclusion which plainly involves, under the undisputed facts, an error of law, or which is shown *to be supported by no substantial evidence* or to be *contrary to the indisputable character of the evidence, thereby likewise involving an error of law,* will be so reviewed. Pennsylvania Co. v. United

States, 236 U. S. 351, 361; Louisville Railroad v. United States (D. C.), 216 Fed. 672, 679 (three judges); and cases therein cited."

In this case we assert not only that the Commission's finding of discrimination is "contrary to the indisputable character of the evidence" and "unsupported by any substantial evidence," but even that it is unsupported by any evidence at all involving, in short, an error of law in the conclusion reached from the undisputed facts.

(6) Decision in the Nashville Coal Case Does Not Affect This Case.

The lower court referred to the decisions of itself and of this court in the Nashville Coal Case (216 Fed. 672), reviewing an order of the Commission in 28 I. C. 533 and affirmed by this court in L. & N. R. R. Co. v. U. S., 238 U. S. 1. The finding of the court, however, in that case furnishes no precedent for the court's opinion in this case for the reason that the case there decided was entirely different from the one here presented. That case for the most part related to the rates on coal, but one branch concerned the practice of the carriers at Nashville with reference *to switching coal.* The charge was that the joint agency would switch all non-competitive freight except coal and that this was a discrimination against coal. The evidence before the Commission relating to the conditions at Nashville was not nearly so full there as here, and the Commission, in its report, specifically found that the L. & N. and the N., C. & St. L. *operated their individually*

owned tracks independently of each other and *switched for each other,* saying:

> "Both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis have *individually owned tracks* which they *operate independently each of the other or of the Terminal Company,* and upon these tracks industries are located. To and from these industries as well as to and from those on the rails of the Terminal Company traffic of all kinds is *freely interswitched by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis.*"

This finding in the light of the evidence in the present case was, of course, wholly incorrect.

When suit was brought in the district court to review and annul the Commission's order, the transcript of evidence taken before the Commission was *not introduced,* so the court *was confined,* as to the facts, *to the finding of the Commission.*

The discussion of the switching question, which was manifestly a subordinate issue in the case, will be found in the latter part of the opinion.

In setting out the *facts,* taken solely from the Commission's report or opinion, as no facts were in the record, the court showed clearly that it understood that the two railroads were independently operating their individually owned tracks and were actually switching cars for each other; and those supposed facts formed the basis of its opinion. For example, the opinion states:

"That both the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway also individually own tracks *which they operate independently of each other or of the Terminal Company,* and upon which industries are located; that traffic of all kinds *is freely interchanged by the Louisville & Nashville Railroad and Nashville & Chattanooga Railway to and from these industries* as well as to and from those on the rails of the Terminal Company; that the tariffs of the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway provide that no charge will be made for *switching between their respective lines at Nashville,* the expense of this service presumably being absorbed by the line bringing in the traffic."

Again in the court's discussion of the effect of the Commission's order, it said:

"Obviously its only effect is to require the petitioners to receive cars of coal from the Tennessee Central Railroad at junction points and to switch and deliver the same to industries along their respective lines, *in like manner as they receive such cars from one another and switch and deliver the same,* upon a just, reasonable and non-prohibitive *switching charge,* which they may themselves establish, *but which shall be the same as they shall respectively make to one another.*"

With this wholly erroneous view of the facts, gained solely from the report of the Commission, for the court in its opinion distinctly states that the transcript of the record before the Commission was not filed with it, the

court thus gives one of the questions raised by the railroad:

> "(1) *That the facts found by the Commission* do not, as a matter of law, support the orders made by it."

In their brief to the court counsel for the railroad companies did insist that there was no discrimination at Nashville because the companies would not switch for each other; but this argument naturally fell upon deaf ears since, in addition to the record in the case before the Commission being absent, it was conceded by the railroad companies, for the purpose of that suit, that *the facts stated in the report of the Commission were all true.* The court, after holding that the Commission had jurisdiction of the subject, simply declared that it was bound by the Commission's finding upon the question of discrimination and said:

> "After careful *consideration of the evidential facts set forth in the report of the Commission in reference to the switching practice of the petitioners at Nashville,* without determining the weight given to such facts, when separately considered, we are of opinion that *such facts,* when considered as a whole, *afford substantial evidence* supporting the conclusion of the Commission that such switching practice, which in effect prohibited the interswitching of coal to and from the tracks of the Tennessee Central Railroad, was unreasonably and unjustly discriminatory."

In the light of the difference between the two cases presented to this court, it is plain that the opinion in the Nashville Coal Case affords no aid in determining whether or not, as a fact, according to the evidence now for the first time before this court, the two railroads in question switch for each other, and, therefore, whether or not the discrimination claimed exists.

(7) This Court Has Distinctly Declared the Right of Two Companies to Unite Their Terminals for Their "Common but Exclusive Use."

If there were any doubt as to the legality of the arrangement between plaintiffs at Nashville and of their right to enjoy it without having to share it with the third railroad, it is set at rest by the decision of this court in *United States* v. *Terminal Railroad Company of St. Louis*, 224 U. S. 383. There this court held that the arrangement for a combination of all the terminal facilities at St. Louis into one holding company was a violation of the statute for the reason that, because of the geographical conditions at St. Louis, it would be practically impossible for any other railroad to do business in that city unless admitted into the combination. The opinion explained in detail just how and why this would result.

But the court definitely announced the principle that such arrangements, known to be prevalent throughout the country, are ordinarily proper and legal. It said:

> "It *can not be controverted that, in ordinary circumstances,* a number of independent companies might combine for the purpose of controlling or acquiring terminals *for their common but exclusive use.* In such cases other companies might be admitted upon terms *or excluded altogether.* If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals."

But the court immediately distinguishes the ordinary case from the situation at St. Louis, saying:

> "But the situation at St. Louis is *most extraordinary,* and *we base our conclusion in this case, in a large measure, upon that fact.* The 'physical or topographical condition peculiar to the locality,' which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the impartial agent of all who, *owing to conditions, are under such compulsion, as here exists, to use its facilities.*"

Of course, there is no suggestion that the Tennessee Central is shut out of Nashville by plaintiffs' arrangement. On the contrary it is already in the city of Nashville, and is, and for a number of years past has been, doing business without other inconvenience, so far as this record shows, than the refusal of the two companies, which do jointly own certain terminal tracks, *to engage with it in reciprocal switching.*

We have tried to present all the features of this case; those of real importance are simple. The Commission's own opinion declares that the joint arrangement, as it is, causes "shippers little direct pecuniary loss" (Vol. II, p. 586), while the uncontradicted evidence shows that to change it, as the city asks, will give the Tennessee Central the net sum of $190,130.00 per annum, taken from the road-haul revenues which by all standards of right plaintiffs are entitled to earn. This strikes the moral sense as wrong. Accordingly the law, as announced by the Commission itself in the Louisville Switching Case, *supra,* forbids one railroad to do this wrong to another. How, then, can it lawfully be done to two railroads which build joint terminals and jointly operate them as one? The Commission answers that the joint arrangement constitutes a discrimination. But that answer is complete, for if discrimination were conceded the Commission must have power to remove it, and must do it in a proper way.

If there were no proviso to Section 3 of the Act to Regulate Commerce, the terminal arrangement of plaintiffs at Nashville, jointly owned in part as well as jointly operated, is perfectly natural, proper and legal in itself and could constitute no discrimination against the Tennesssee Central in view of the totally dissimilar conditions and surroundings shown by all the evidence. If plaintiff's arrangement, however, were altogether a *mere exchange of trackage rights,* and if there were no proviso to Section 3, then a court might under certain circumstances hold that the transaction was discriminatory and

require them to admit the Tennessee Central to a like arrangement, though we hold a different view of this proposition; but no good reason nor authority can be shown in support of the contention that even in that event the Commission could validly order the plaintiffs to cease their own arrangement or else do for the Tennessee Central a thing which is wholly different from what they do for each other.

There are three controlling reasons, therefore, why the action of the Commission and the court in this case is wholly unsupported by the evidence and both tribunals are in error in the ultimate conclusion drawn from undisputed facts. They are these: (1) the plaintiffs' arrangement is not merely an exchange of trackage rights, but is vastly more; (2) the proviso to Section 3 stands there today just as it did when the Act was passed and in the light of its own language and its interpretation by the courts withdraws the subject of trackage rights, reciprocal or otherwise, from the Commission's power over discrimination granted by Section 3; and (3) even if these things were not so, the Commission has here sought to prevent a discrimination by ordering a thing wholly different from the alleged discriminatory acts complained of when it orders reciprocal switching, since the uncontradicted evidence shows conclusively that plaintiffs do not in fact switch for each other, but instead do jointly operate terminals, which are either jointly owned or in which joint trackage rights have been acquired.

We confidently insist that all three of these propositions are sound, but if any one of them is then the Commission's order is void and the requirement that plaintiffs switch competitive cars for the Tennessee Central is a great wrong. The lower court's approval of this is, we believe, a grevious error which we earnestly ask this court to correct.

Respectfully submitted,

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